


5 February 1976

MEMORANDUM FOR: Morning Meeting Participants

1. At a meeting of the ICG yesterday at 3:00, the Justice Department tabled legislation dealing with three topics: (a) assassinations, (b) mail openings, and (c) electronic surveillance. Copies of this package have been made available to the "ADD's Group"; for those who have not received it, copies are available in OGC.
2. With respect to assassinations, Nino Scalia, Assistant Attorney General, Office of Legal Counsel, stated they were content to go with the draft bill contained in the Church report. As to the mail opening bill, it was pointed out that there was no provision for warrantless mail openings for national security and this may be regarded by some as precedent with respect to electronic surveillance. With respect to these two bills, the White House expects comments from agencies by the close of business Friday, 6 February.
3. With respect to the electronic surveillance bill, it was stated that it is not yet complete and consequently the White House was not expecting a sign-off from interested agencies, but rather general views such as serious difficulties with the bill or no serious difficulties or even views that no legislation is necessary, although one of the specific purposes is to build a backfire against many of the electronic surveillance bills introduced already on the hill. These comments are expected by close of business, Friday, 6 February.
4. At this same meeting it was also stated that views of agencies were desired by close of business, 6 February, on the restrictions Executive order and the Church oversight bill, S.2893. The ADD's met yesterday on the restrictions Executive order. OGC's position on S.2893 was sent to the ADD's group yesterday.
5. The ICG was advised that the President planned to make a statement soon which would endorse the assassination legislation and the mail opening legislation, together with our sources and methods legislation. It was expected that the President would make general references to electronic surveillance legislation and that the matter is being studied carefully looking toward legislation.


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A B I L L

To amend Title 18, United States Code, to authorize applications for a court order approving the use of electronic surveillance to obtain foreign intelligence information.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,
that this Act may be cited as the "Foreign Intelligence Surveillance Act of 1976."

Sec. 2 Title 18, United States Code, is amended by adding a new chapter after Chapter 119:

Chapter 120. Electronic Surveillance within the United States for Foreign Intelligence Purposes --

Section 2521. Definitions.

(a) Except as otherwise provided in this section the definitions of Section 2510 of this title shall apply to this chapter.

(b) As used in this chapter --

1. "agent of a foreign power" means a person who is an officer or employee of a foreign government or who, pursuant to the direction of a foreign government or foreign based terrorist group, is consciously engaged in spying, sabotage, or terrorist activities.

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2. "electronic surveillance" means the acquisition, by an electronic device, without the consent of any party thereto, of the contents of a wire communication to or from a person within the United States, or of an oral communication within the United States, or of a radio transmission made with a reasonable expectation of privacy where the point of origin and all intended recipients are located within the United States.

3. "foreign intelligence information means:

(i) information relating to the ability of the United States to protect itself against actual or potential attack or other hostile acts of a foreign power or its agents;

(ii) information, with respect to foreign territories, deemed necessary to the security of the nation or to the conduct of the foreign affairs of the United States;

(iii) information relating to the ability of the United States to protect national security information against foreign intelligence activities.

4. "Attorney General" means the Attorney General of the United States or in his absence the acting Attorney General.

Section 2522. Authorization for Electronic Surveillance for Foreign Intelligence Purposes.

The Attorney General, pursuant to written authorization by the President, may approve an application to a Federal judge having jurisdiction under section 2523 of this chapter, and such judge may grant an order, in conformity with section 2525 of this chapter, approving electronic surveillance of an agent of a foreign power for the purpose of obtaining foreign intelligence information.

Section 2523. Designation of Judges Authorized to Grant Orders for Electronic Surveillance.

(a) The Chief Justice of the United States shall designate seven district court judges, any one of whom shall be authorized to hear applications for and grant orders approving electronic surveillance anywhere within the United States under the procedures set forth in this chapter.

(b) The United States shall have the right to appeal the denial of any application made under this chapter to a panel of three judges chosen by the Chief Justice from among the judges of the United States Court of Appeals for the District of Columbia Circuit, and shall further have the right to appeal an affirmance of denial by the panel to the Supreme Court.

(c) Applications made and orders granted under this chapter shall be sealed by the presiding judge and shall be kept under security measures established by the Chief Justice

in consultation with the Attorney General.

Section 2524. Application for an Order.

(a) Each application for an order approving electronic surveillance under this chapter shall be made in writing upon oath or affirmation to a judge having jurisdiction under section 2523 of this chapter. Each application must be approved by the Attorney General and shall include the following information:

1. the identity of the officer making the application;
2. the authority of the applicant to make the application;
3. a statement of the facts and circumstances relied upon by the applicant to justify his belief that
 - (i) the target of the electronic surveillance is an agent of a foreign power;
 - (ii) the facilities or the place at which the electronic surveillance is directed are being used, or are about to be used, by an agent of a foreign power;
 - (iii) the information sought will be acquired if the electronic surveillance is permitted;
4. a statement of the procedures by which the acquisition and retention of non-foreign intelligence

information will be minimized.

5. a description of the type of information sought and a certification by the Assistant to the President for National Security Affairs or any other appropriate Executive branch official appointed by the President by and with the advice and consent of the Senate that such information is foreign intelligence information that cannot feasibly be obtained by normal investigative techniques;

6. a statement of the means by which the surveillance will be effected;

7. a statement of the facts concerning all previous applications known to the Attorney General that have been made to any judge under this chapter involving any of the persons, facilities or places specified in the application, and the action taken on each previous application;

8. a statement of the period of time for which the electronic surveillance is required to be maintained. If the nature of the intelligence gathering is such that the approval of the use of electronic surveillance under this chapter should not automatically terminate when the described type of information has first been obtained, a description of facts supporting the belief that additional information of the same type will be

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obtained thereafter.

(b) The Attorney General may require any other affidavit or certification from any other officer in connection with the application.

(c) The judge may require the applicant to furnish such other information or evidence as may be necessary to make the determinations required by section 2525 of this title.

Section 2525. Issuance of an Order.

(a) Upon an application made pursuant to section 2524 of this title, the judge shall enter an ex parte order approving the electronic surveillance if he finds that:

1. the President has authorized the Attorney General to approve applications for electronic surveillance for foreign intelligence information;

2. the application has been approved by the Attorney General;

3. on the basis of the facts submitted by the application, there is probable cause to believe that:

- (i) the target of the electronic surveillance is an agent of a foreign power; and

- (ii) the facilities or place at which the electronic surveillance is directed are being used, or are about to be used, by an agent of a foreign power; and

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(iii) the information sought will be obtained if the surveillance is approved.

4. minimization procedures to be followed are reasonably designed to minimize the acquisition and retention of non-foreign intelligence information;

5. certification has been made pursuant to section 2524 (a) (5) that the information sought is foreign intelligence information that cannot feasibly be obtained by normal investigative techniques.

(b) An order approving an electronic surveillance under this section shall:

1. specify:

(i) the identity or a characterization of the persons targeted by the electronic surveillance;

(ii) the nature and location of the facilities or the place at which the electronic surveillance will be directed;

(iii) the type of information sought;

(iv) the type of communication sought to be acquired and the means by which the electronic surveillance will be effected; and

(v) the period of time during which the electronic surveillance is approved; and

2. direct:

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necessary to achieve the purposes for which it was granted, or for ninety days, whichever is less.

(d) Notwithstanding any other provision of this chapter, when the Attorney General reasonably determines that:

1. an emergency situation exists with respect to the employment of electronic surveillance to obtain foreign intelligence information before an order authorizing such surveillance can with due diligence be obtained, and

2. the factual basis for issuance of an order under this chapter to approve such surveillance exists, he may authorize the emergency employment of electronic surveillance if a judge designated pursuant to section 2523 of this title is informed as soon as possible after the decision is made to employ emergency electronic surveillance and if an application in accordance with this chapter is made to that judge within 24 hours after that decision, whether or not the electronic surveillance is still in effect at that time. The emergency electronic surveillance may continue until the judge approves or denies an order pursuant to subsection (a) of this section, but the judge shall stay the effect of his denial if the Attorney General appeals that denial within 24 hours.

(e) A judge denying an order under this section or a panel affirming such denial under section 2523(b) shall state

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the reasons therefor.

Section 2526. Use of Information.

(a) Information acquired from an electronic surveillance conducted pursuant to this chapter may be used and disclosed by Federal officers and employees only to the extent that such use and disclosure is appropriate to the proper performance of their official duties.

(b) The minimization procedures required under this chapter shall not preclude the retention and disclosure of non-foreign intelligence information acquired incidentally which relates to a violent crime.

(c) When information acquired from or the product of an electronic surveillance conducted pursuant to this chapter is received in evidence in any trial, proceeding, or other hearing in any Federal or State court, the provisions of section 2518(9) of chapter 119 shall not apply. No otherwise privileged communication obtained in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

(d) If an emergency employment of electronic surveillance is authorized under section 2525(d) and a subsequent order approving the surveillance is not obtained, the judge with whom an application for an order under section 2524 is

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filed shall cause to be served on the persons named in the application, and such other parties under electronic surveillance as the judge may determine in his discretion it is in the interest of justice to serve, an inventory which shall include notice of

1. the fact of the application;
2. the period of the surveillance; and
3. the fact that during the period information was or was not obtained.

On an ex parte showing of good cause to the judge the serving of the inventory required by this subsection may be postponed.

Section 2527. Report of Electronic Surveillance.

(a) Within thirty days after the expiration of the period of surveillance authorized in an order, or extension of an order, entered under section 2525, or after the denial of an application for an order or extension approving an electronic surveillance, the Attorney General shall report to the Administrative Office of the United States Courts:

1. the fact that an order or extension was applied for;
2. the kind of surveillance sought;
3. the fact that the application for the order or extension was granted as applied for, was granted

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in modified form, or was denied;

4. the period of time the electronic surveillance;
was authorized by the order or extension; and

5. the identity of the officer making the appli-
cation.

(b) In April of each year the Attorney General shall transmit to the Congress a report concerning the number of applications made for orders and extensions of orders approving electronic surveillance, and the number of such orders and extensions granted and denied, during the preceding calendar year.

B

A BILL

To amend Title 18, United States Code, to authorize applications for a court order approving the opening of mail to obtain foreign intelligence information.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that this Act may be cited as the "Mail Surveillance Act of 1976."

Sec. 2. Title 18, United States Code, is amended by adding a new Chapter after Chapter 120:

"Chapter 121. Opening United States mail for foreign intelligence purposes --

"Section 2528. Authorization for opening mail for foreign intelligence purposes.

"Notwithstanding any other provision of law, the Attorney General, pursuant to written authorization by the President, may approve an application to a Federal judge designated according to Section 2523 of Chapter 120 of this Title, and such judge may grant an order, in conformity with Section 2530 of this Chapter, approving the opening of first class mail in United States postal channels.

"Section 2529. Application for an Order.

"(a) Each application for an order approving the opening of mail under this chapter shall be made in writing upon oath or affirmation to a judge designated pursuant to Section 2523 of Chapter 120 of this Title. Each application must be approved by the Attorney General and shall include the following information:

"(1) The identity of the officer making the application;

"(2) The authority of the applicant to make the application;

"(3) A statement of the facts and circumstances relied upon by the applicant to justify his belief that the person whose mail is to be opened is consciously engaged in spying, sabotage, or terrorist activities pursuant to the direction of a foreign government or foreign terrorist group;

"(4) A description of the type of information sought and a certification by the Assistant to the President for National Security Affairs or any Executive Branch official appointed by the President

by and with the advice and consent of the Senate that such information relates to the ability of the United States to protect itself against actual or potential attack or other hostile acts of a foreign power, a foreign terrorist group, or their agents or relates to the ability of the United States to protect national security information against foreign intelligence activities, and that such information cannot feasibly be obtained by normal investigative techniques;

"(5) A statement of the procedures by which the acquisition and retention of information not relevant to the purpose for which the mail opening was approved will be minimized;

"(6) A statement of the facts concerning all previous applications known to the Attorney General that have been made to any judge under this Chapter involving any of the persons specified in the application, and the action taken on each previous application;

"(7) A statement of the period of time during which mail addressed to, intended for, or coming from the person described in paragraph (3) of this subsection may be opened. If the nature of the intelligence

gathering is such that the approval of the opening of mail under this Chapter should not automatically terminate when the described type of information has first been obtained, a description of facts supporting the belief that additional information of the same type will be obtained thereafter.

"(b) The Attorney General may require any other affidavit or certification from any other officer in connection with the application.

"(c) The judge may require the applicant to furnish such other information or evidence as may be necessary to make the determinations required by Section 2530 of this Title.

"Section 2530. Issuance of an Order.

"(a) Upon an application made pursuant to Section 2529 of this Title, the judge shall enter an ex parte order approving the opening of mail if he finds that:

"(1) The President has authorized the Attorney General to approve applications for opening mail in United States Postal channels pursuant to this Chapter;

"(2) the application has been approved by the Attorney General;

"(3) on the basis of the facts submitted by the applicant, there is probable cause to believe that the

person whose mail is to be opened is consciously engaged in spying, sabotage, or terrorist activities pursuant to the direction of a foreign government or foreign terrorist group;

"(4) certification has been made pursuant to Section 2529(a)(4) of this Title that the information sought is information relating to the ability of the United States to protect itself against actual or potential attack or other hostile acts of a foreign power, foreign terrorist group, or their agents, or relating to the ability of the United States to protect national security information against foreign intelligence activities, which cannot feasibly be obtained by normal investigative techniques;

"(5) minimization procedures to be followed are reasonably designed to minimize the acquisition and retention of information not relevant to the purpose for which the mail opening was approved.

"(b) An order approving the opening of mail under this section shall

"(1) specify:

"(i) the identity, if known, of the person whose mail is to be opened, or, if the identity

of the person is not known, the address to which the mail to be opened is addressed,

"(ii) the type of information sought,

"(iii) the period of time during which such mail may be opened; and

"(2) direct:

"(i) that first class mail in United States postal channels addressed to, intended for, or sent from the person or address specified in subparagraph (i) of paragraph (1) of this subsection, may be opened,

"(ii) that the minimization procedures be followed, and

"(iii) that, upon the request of the applicant, United States Postal Service employees shall furnish the applicant forthwith any and all information, facilities, or other aid necessary to accomplish the mail opening in such a manner as will protect its secrecy and produce a minimum of interference with the timely delivery of mail.

"(c) An order issued under this section may approve the opening of mail for a period necessary to achieve its purpose,

(or for thirty days, whichever is less. Extensions of an order issued under this chapter may be granted upon an application for an extension made in the same manner as required for an original application and after findings required by subsection (a) of this section. An extension may be for the period necessary to achieve the purposes for which it was granted, or for thirty days, whichever is less.

"(d) Notwithstanding any other provision of this chapter, when the Attorney General reasonably determines that:

"(1) An emergency situation exists with respect to the opening of mail for purposes authorized by this chapter before an order authorizing such opening can with due diligence be obtained, and

"(2) the factual basis exists for issuance of an order under this chapter to approve such opening, he may authorize the emergency opening of mail of a person believed to be consciously engaged in spying, sabotage, or terrorist activities pursuant to the direction of an foreign government or foreign terrorist group, if a judge designated pursuant to section 2523 of this Title is informed as soon as possible after the decision is made to employ emergency mail opening, and if an application in accordance with this Chapter is made to that judge within twenty-four hours after that decision, whether or not the

opening of mail continues at that time. The emergency opening of mail may continue until the judge approves or denies an order pursuant to subsection (a) of this section, but the judge shall stay the effect of his denial if the Attorney General appeals that denial within twenty-four hours.

"(e) If a judge denies an order applied for under this chapter, the United States shall have the right to appeal that denial to the panel of three judges specified in section 2523(b) of this Title. A judge denying an order under this chapter or a panel affirming such denial shall state the reasons therefor. The United States shall have the right to appeal an affirmance of a denial by the panel to the Supreme Court.

"Section 2531. Use of information.

"(a) Information acquired from the opening of mail conducted pursuant to this chapter may be used and disclosed by Federal officers and employees only to the extent that such use and disclosure is appropriate to the proper performance of their official duties.

"(b) The minimization procedures required under this chapter shall not preclude the retention and disclosure of non-foreign intelligence information incidentally acquired which is evidence of a violent crime.

"(c) No otherwise privileged communication obtained in accordance with, or in violation of, provisions of this chapter

(shall lose its privileged character.

"(d) If an emergency mail opening is authorized under section 2530(d) and a subsequent order approving the opening is not obtained, the judge with whom an application for an order under section 2529 is filed shall cause to be served on the person named in the application, and such other parties whose mail was opened as the judge may determine in his discretion is in the interest of justice, an inventory which shall include notice of:

"(1) the fact of the application;

"(2) the period of the mail opening; and

"(3) the fact that during the period mail was or was not opened.

On an ex parte showing of good cause to the judge the serving of the inventory required by this subsection may be postponed.

"Section 2532. Report of mail opening.

"(a) Within thirty days after the expiration of the period of mail opening approved in an order, or extension of an order, entered under section 2530, or after the denial of an application for an order or extension approving a mail opening, the Attorney General shall report to the Administrative Office of the United States Courts:

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"(1) The fact that an order or extension was applied for;

"(2) the period of time during which the opening of mail was approved by the order or extension; and

"(3) the identity of the officer making the application.

"(b) In April of each year the Attorney General shall transmit to the Congress a report concerning the number of applications made for orders and extension of orders approving the opening of mail, and the number of such orders and extensions granted and denied, during the preceding calendar year."

C

APPENDIX A

[S. _____, 94th Cong., 1st sess.]

A BILL, To make unlawful the entering into a conspiracy to assassinate a foreign official outside the United States, the assassination of a foreign official outside the United States, or the attempted assassination of a foreign official outside the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title 18, United States Code, is amended by adding immediately after Section 1117 the following new section:

"§1118. Conspiracy to assassinate foreign official outside the United States; attempted assassination of foreign official outside the United States; assassination of foreign official outside United States.

"(a) If any officer or employee of the United States or any other person while within the United States or the special maritime and territorial jurisdiction of the United States, conspires with any other such officer, employee or person to kill any foreign official because of such official's political views, actions or statements, while such official is outside the United States and such jurisdiction, and one or more such officers or employees or persons does any overt act within the United States or such jurisdiction to effect the object of the conspiracy, each shall be punished by imprisonment for any term of years or for life.

"(b) Whoever being an officer or employee of the United States, or a citizen of the United States, while outside the United States and the special maritime and territorial jurisdiction of the United States, conspires with any other such officer or employee or with any other person or persons to kill any foreign official, because of such official's political views, actions or statements, while such official is outside the United States and such jurisdiction, and one or more such officers, employees, citizens or other persons does any overt act to effect the object of the conspiracy, shall be punished by imprisonment for any term of years or life.

"(c) Whoever being an officer or employee of the United States, or a citizen of the United States, while outside the United States and the special maritime and territorial jurisdiction of the United States, attempts to kill any foreign official, because of such official's political views, actions or statements, while such official is outside the United States and such jurisdiction, and one or more such officers, employees, citizens or other persons does any overt act to effect the object of the conspiracy, shall be punished by imprisonment for any term of years or life.

and such jurisdiction, shall be punished by imprisonment for any term of years or life.

"(d) Whoever being an officer or employee of the United States, or a citizen of the United States, while outside the United States and the special maritime and territorial jurisdiction of the United States, kills any foreign official, because of such official's political views, actions or statements, while such official is outside the United States and such jurisdiction, shall be punished as provided under sections 1111 and 1112 of this title, except that any such officer or employee or citizen who is found guilty of murder in the first degree shall be sentenced to imprisonment for life.

"(e) As used in this section, the term--

"(1) 'officer or employee of the United States' means any officer or employee, whether elected or appointed, in the executive, legislative, or judicial branch of the Government of the United States (including the District of Columbia) and its territories and possessions, and includes any officer or member of the armed forces;

"(2) 'foreign official' means a Chief of State or the political equivalent, President, Vice President, Prime Minister, Premier, Foreign Minister, Ambassador, or other officer, employee, or agent; (a) of a foreign government with which the United States is not at war pursuant to a declaration of war or against which United States Armed Forces have not been introduced into hostilities or situations pursuant to the provisions of the War Powers Resolution; or (b) of a foreign political group, party, military force, movement or other association with which the United States is not at war pursuant to a declaration of war or against which United States Armed Forces have not been introduced into hostilities or situations pursuant to the provisions of the War Powers Resolution; or (c) of an international organization;

"(3) 'foreign government' means the government of a foreign country, irrespective of recognition by the United States;

"(4) 'international organization' means a public international organization designated as such pursuant to section 1 of the International Organizations Immunity Act (22 U.S.C. 288);

"(5) 'citizen of the United States' means, in addition to a United States citizen, any national of the United States, and any person who has been and is classified as an alien admitted to the United States as a permanent resident under the laws of the United States."

Sec. 2. The analysis of chapter 51 of title 18, United States Code, is amended by adding at the end thereof the following:

"1118. Conspiracy to assassinate foreign official outside United States; attempted assassination of foreign official outside United States; assassination of foreign official outside United States."

D

C. THE NEED FOR A STATUTE

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Commendable and welcome as they are, these CIA directives are not sufficient. Administrations change, CIA directors change, and someday in the future what was tried in the past may once again become a temptation. Assassination plots did happen. It would be irresponsible not to do all that can be done to prevent their happening again. A law is needed. Laws express our nation's values; they deter those who might be tempted to ignore those values and stiffen the will of those who want to resist the temptation.

The Committee recommends a statute¹ which would make it a criminal offense for persons subject to the jurisdiction of the United States (1) to conspire, within or outside the United States, to assassinate a foreign official; (2) to attempt to assassinate a foreign official, or (3) to assassinate a foreign official.

Present law makes it a crime to kill, or to conspire to kill, a foreign official or foreign official guest while such a person is in the United States. (18 U.S.C. 1116-1117). However, there is no law which makes it a crime to assassinate, to conspire to assassinate, or to attempt to assassinate a foreign official while such official is outside the United States. The Committee's proposed statute is designed to close this gap in the law.

Subsection (a) of the proposed statute would punish conspiracies within the United States; subsection (b) would punish conspiracies outside the United States. Subsection (b) is necessary to eliminate the loophole which would otherwise permit persons to simply leave the United States and conspire abroad. Subsections (c) and (d), respectively, would make it an offense to attempt to kill or to kill a foreign official outside the United States.

Subsections (a), (b), (c), and (d) would apply expressly to any "officer or employee of the United States" to make clear that the statute punishes conduct by United States Government personnel, as well as conduct by private citizens. In addition, subsection (a), which covers conspiracies within the United States, would apply to "any other person," regardless of citizenship. Non-citizens who conspired within the United States to assassinate a foreign official would clearly come within the jurisdiction of the law. Subsections (b), (c), and (d), which deal with conduct abroad, would apply to United States citizens, and to officers or employees of the United States, regardless of their citizenship. Criminal liability for acts committed abroad by persons who are not American citizens or who are not officers or employees of the United States is beyond the jurisdiction of the United States.

"Foreign official" is defined in subsection (e) (2) to make clear that an offense may be committed even though the "official" belongs to an insurgent force, an unrecognized government, or a political party. The Committee's investigation—as well as the reality of international politics—has shown that officials in such organizations are potential targets for assassination.² Killing, attempting to kill, or conspiring to kill would be punishable under the statute only if it were politically motivated. Political motivation would encompass acts against foreign officials because of their political views, actions, or statements.

The definition of "foreign official" in section (e) (2) also provides that such person must be an official of a foreign government or movement "with which the United States is not at war pursuant to a declaration of war or against which the United States Armed Forces

¹ The recommended statute is printed in Appendix A.

² For example, Lumumba was not an official of the Congolese government at the time of the plots against his life, and Trujillo, even though the dictator of the Dominican Republic, held no official governmental position in the latter period of his regime.

have not been introduced into hostilities or situations pursuant to the provisions of the War Powers Resolution." This definition makes it clear that, absent a declaration of war or the introduction of United States Armed Forces pursuant to the War Powers Resolution, the killing of foreign officials on account of their political views would be a criminal offense.

During the Committee's hearings, some witnesses, while strongly condemning assassination, asked whether assassination should absolutely be ruled out in a time of truly unusual national emergency. Adolf Hitler was cited as an example. Of course, the cases which the Committee investigated were not of that character. Indeed, in the Cuban missile crisis—the only situation of true national danger considered in this report—assassination was not even considered and, if used, might well have aggravated the crisis.

In a grave emergency, the President has a limited power to act, not in violation of the law, but in accord with his own responsibilities under the Constitution to defend the Nation. As the Supreme Court has stated, the Constitution "is not a suicide pact." (*Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963))

During an unprecedented emergency, Abraham Lincoln claimed unprecedented power based on the need to preserve the nation:

" * * * my oath to preserve the Constitution to the best of my ability, imposed upon me the duty of preserving, by every indispensable means, that government—that nation—of which that Constitution was the organic law. Was it possible to lose the nation, and yet preserve the Constitution? By general law, life and limb must be protected; yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb. I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the Constitution, through the preservation of the nation * * * . (*The Complete Works of Abraham Lincoln*, Vol. X, pp. 65-66.) (Nicolay and Hay, Eds. 1893.)

Whatever the extent of the President's own constitutional powers, it is a fundamental principle of our constitutional system that those powers are checked and limited by Congress, including the impeachment power. As a necessary corollary, any action taken by a President pursuant to his limited inherent powers and in apparent conflict with the law must be disclosed to Congress. Only then can Congress judge whether the action truly represented, in Lincoln's phrase, an "indispensable necessity" to the life of the Nation.

As Lincoln explained in submitting his extraordinary actions to Congress for ratification:

In full view of his great responsibility he has, so far, done what he has deemed his duty. You will now, according to your own judgment, perform yours. (Abraham Lincoln, Message to Congress in Special Session, July 4, 1861.)